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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. ~~1672~~ 70-144

NEWSWEEK, INC.,

Petitioner,

—against—

WAYNE VANDENBURG,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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PRELIMINARY OBSERVATION

As noted at page 8 of our Petition for a Writ of Certiorari, although Vandenburg persistently denied, in his sworn testimony and briefs below, that he had "promptly dropped champion Bob Beamon and five others from the squad" after the Brigham Young Meet, this aspect of Vandenburg's claim was reluctantly abandoned during oral argument in the Fifth Circuit. It is not reasserted here.

The fact that Vandenburg (as he now concedes) did in April, 1968, precisely what Newsweek said he threatened to do in February of that year was but one persuasive reason, among many, why Axthelm ultimately became con-

vinced that Vandenburg had lied to him in February, 1968, when Vandenburg denied that he had threatened to dismiss from the UTEP team any athlete who boycotted the NYAC Meet.

We refer at the outset to Vandenburg's abandoned claim, not only because of its obvious relevance to the issue of "actual malice" (as well as truth and damages), but because it casts a cloud on the credibility of Vandenburg's entire presentation—a cloud which Vandenburg's Brief in Opposition scarcely serves to dispel: The brief is flagrantly misleading. Facts are misstated. Testimony is contorted and quoted out of context. "Evidence" has even been fabricated.

There follow a number of examples, by no means exhaustive, of how Respondent has attempted to deceive this Court as to the Record below.*

DISCUSSION

I

As Vandenburg quotes Harry Edwards (Br., top of p. 12), one would believe that Edwards could not "vouch" for the accuracy of a portion of "The Angry Black Athlete." In fact, the quoted testimony related to an entirely different article Axthelm had earlier written for *Sports Illustrated;* and it was not directed to the truth of what was published, but was simply his response to the following question:

> "Is the following a correct quotation from the aforesaid article written by Pete Axthelm in

*Because Respondent has so abused that Record, we have caused a copy, certified by the Fifth Circuit Clerk, to be filed with the Court. References preceded by "Record" are to its pages. References to pages of Vandenburg's brief are preceded by "Br."

Sports Illustrated . . . or, if not, then explain in detail". (Record, p. 437)

II

Vandenburg's reference (Br., p. 12) to Edward's comment on a Newsweek article published long after "The Angry Black Athlete" (and which is therefore scarcely probative of the issue of "actual malice") is similarly misleading. Vandenburg implies inaccurately that Edwards' criticism was directed to Axthelm's reportorial ability when, in fact, he was objecting to the phraseology and conjecture implicit in the question propounded to him. Moreover, as the unedited text makes clear, Edwards' testimony has been so rearranged and "edited" as to distort its import: The testimony actually reads (Record, pp. 497-500):*

"Q260. Have you ever called Pete Axthelm, Sports Editor of *Newsweek* Magazine, and give him information which he thereafter published in Newsweek Magazine?

A. It's quite possible that I have.

* * *

Q261. If your answer to the preceding cross-interrogatory is in the affirmative, state whether or not you furnished him information concerning your contact with angry Mexican students who were absorbed in secret plans for demonstrations and possible riots that could disrupt and even destroy the Olympics.

*Those portions of the testimony "quoted" by Vandenburg have, for the Court's convenience, been underscored here and throughout this Reply Brief whenever the unedited, full text of such testimony is set forth.

A. This I do not recall, and not only that, but I object to the phrasing of the question, because as far as I'm concerned it involves a point of conjecture and a point of conjecture which I, myself, do not agree with.

Q262. If your answer to the next preceding cross-interrogatory is in the affirmative, state whether or not the following is a true and correct quotation from *Newsweek* Magazine from an article headed "Sports—Plot to Kill the Olympics":

> "The new threat to the Olympics was revealed last week, reports Newsweek Sports Editor Pete Axthelm, when students claiming to be leaders of CAOS (Comite Anti-Olimpico de Subversion) visited Harry Edwards, leader of the Black Athletes' Movement in the United States, in San Jose, California. 'We have the support of at least 100,000 young people,' they told Edwards. 'We are prepared to lose some lives in an initial charge on the stadium—but we will stop the Olympics, by any means necessary.'
>
> "Edwards did not say what role, if any, American Black athletes might take in such an effort, but he did fire off a requested letter of support . . ."

A. The statement which was read is invalid in the sense that the students did not communicate with me that they would stop the Olympics. They communicated with me they were going to use the Olympics as a stage area within which to dramatize the plight of the masses of impoverished Mexicans in Mexico, and also to protest the relationship of the Mexican government to the military of the United States. In this regard I supported the protest of the

students. At no time was it communicated to me that it was their intention to stop the Olympic Games. It was their intention to use the Olympic Games as a stage upon which to dramatize the plight of their people, and as far as I was concerned, I could not very well engage in this endeavor myself and then deny other people who considered themselves to be oppressed that same opportunity. So, I did support these students. Whether I gave this information to Pete Axthelm personally, over the phone or through letter—I know I didn't write a letter—I could not say. Pete Axthelm could have picked this up in the press, because I did hold a press conference in Chicago in August of 1968 at which time I made the statement that we were supporting the students who were demonstrating in Mexico and protesting the expenditure of $150,000,000.00 on what they considered to be an event which did not address itself to the needs of the impoverished Mexican people. I may have communicated this directly to Pete Axthelm, either over the telephone or in person, but I am not sure. But I can honestly state that at no time did the students, the Mexican students with whom I had contact tell me that it was their intention to stop the Games. However, I do not deny that one of the repercussions of their activities could have been the stopping or at least the suspension of the regular schedule of events during the course of the Olympic Games."

III

In an article written for *Sports Illustrated,* in February, 1968, Axthelm reported without comment the following statement by Vandenburg (Record, p. 618):

> "I asked each one [of the UTEP black athletes] if he wanted to come," said Coach Wayne Vandenburg, "and each one said yes. There was no pressure. I told them again tonight that they could back out and I'd never hold it against them."

Vandenburg claims (Br. p. 4) that the alleged libelous statements were contrary, not only to the foregoing report, but "to every *earlier* published account on the subject" (emphasis supplied).

Newsweek has never denied, of course, that, at the time of the NYAC Meet, Axthelm—and other reporters—published Vandenburg's denial that he had pressured his players to participate. But this fact can scarcely be probative of Axthelm's "actual malice" five months later, after Vandenburg had actually thrown his black players off the UTEP team and when, according to the uncontradicted testimony in the Record, Axthelm was in possession of additional, consistent information from several sources he considered reliable which supported his conclusion that Vandenburg had lied.

Additionally, Vandenburg never established that Axthelm had ever seen any of the February, 1968 articles to which he now refers and the articles themselves are not in the Record. But even if Axthelm had seen those articles, this fact would be irrelevent to the issue here, since it would only show that, in February, 1968, publications in addition to *Sports Illustrated* considered Vandenburg's public denial worth printing.

The constitutional guarantees of free speech and press cannot be suspended simply because other media, in different circumstances and at an earlier time, published reports inconsistent with the Newsweek story; the applicability of the First Amendment obviously does not depend on press unanimity.

IV

In a patent attempt to bring this case within *Goldwater v. Ginsburg*, 414 F. 2d 324 (2d Cir. 1969), *cert. denied*, 396 U. S. 1049, *reh. denied*, 397 U. S. 978, Vandenburg implies (Br. p. 5) that Axthelm's objective to make "The Angry Black Athlete" . . . "different and to make it mine" was tantamount to a conscious effort to make it false.

Axthelm's actual testimony, which puts the lie to this unwarranted implication, was as follows (Record, p. 262-63):

> "Q. Well, there's a close parallel between his [Jack Olson's] series of articles [for "Sports Illustrated"] and your Newsweek article, is there not?
>
> A. Well, obviously the subject is the same. We made a very, and I think made a very conscious effort to focus in on, on, this was another part of our thinking on the San Jose scene, was, because we wanted ours—we didn't want ours to be like a one-issue condensation of what he was going to do in five. In other words, we weren't interested in trying to hit every area and we decided to steer ours in one direction and hope that that would make it considerable different than his—we didn't want to —we didn't want to make it look like a repetition of anything——
>
> Q. How did you know what Jack Olson's series of articles was going to be?
>
> A. Well, if you——
>
> Q. You know of the article and knew it was five articles and you knew what it generalized, how did you know that?
>
> A. Well, I was at Sports Illustrated when the idea was originated. John Rodgers was there even

> later while it was being done, he did some work on it with Jack, and I was, frankly, very conscious of not, I didn't want to be put in the position at all of having the Sports Illustrated editor say that I had taken anything, you know, used things that were gotten at their expense and through their stringers and everything, so I remember of using nothing that came into the office while I was still there. I purposely, as a matter of fact, skipped certain areas that I felt might, I had a rough idea, of key themes of Jack's piece, and purposely stayed away from that, and as I said I was making a very conscious effort to make it a different story, to make it mine.

V

Vandenburg claims (Br. p. 13), with absolutely no foundation in the Record, that the quotation in "The Angry Black Athlete" attributed to a Southwestern track coach was fictitious, and was therefore evidence of Axthelm's "actual malice" toward Vandenburg. This charge is inexcusable in the light of Axthelm's uncontradicted testimony that the quotation was contained in a dispatch from Newsweek's Los Angeles Bureau as an anonymous quotation, a common journalistic practice, and that it was from another track coach, not Vandenburg (Record, pp. 320-22).

Vandenburg apparently bases his charge of "fictionalization" on the claim (stated as if it were established fact) that the Newsweek file or "packet" of supporting bureau dispatches, documents, articles and other data on which the article was based does not contain the Los Angeles dispatch described by Axthelm.

This claim is utterly unjustified. The packet, which was made available to Vandenburg's counsel, was thereafter misplaced and neither party knows its contents or is

able to account for its loss. The parties in fact entered into a written stipulation dated July 21, 1970, *acknowledging that they did not know what the packet contained.* That stipulation, completely ignored by Vandenburg, reads in relevant part:

> "The Newsweek 'packet' . . . identified in the deposition of Peter Axthelm as the envelope in which the Defendant kept data pertaining to the article 'The Angry Black Athlete' . . . has been lost or misplaced by counsel and its whereabouts are [sic], at the present time, unknown to the parties . . . [T]he parties do not know whether the 'packet' attached hereto is full and complete and whether it contains all of the matters on which the article in question was based . . . [N]one of the exhibits attached to Plaintiff's Controverting Affidavit in Opposition To Defendant's Motion for Summary Judgment were in the Newsweek 'packet', although Axthelm's authorship of the *Sports Illustrated* story marked Exhibit A to said affidavit is not denied or questioned."

VI

The only article published contemporaneously with "The Angry Black Athlete" which Vandenburg claims (Br. p. 4) is contrary to the Newsweek article is one of the *Sports Illustrated* articles by Jack Olsen, published July 15, 1968, which merely republished Vandenburg's February, 1968, statement that he had put no pressure on his athletes at the time of the NYAC Meet.

Vandenburg claims that publication of the Olsen article by *Sports Illustrated* is somehow evidence of Newsweek's "actual malice," conveniently overlooking Axthelm's uncontroverted testimony (Record, pp. 244-47, 259-64) that he never saw that article; that he was unaware of its con-

tent at and before publication of "The Angry Black Athlete"; and that there had been no contemporaneous contact, collaboration or sharing of information between him and Olsen. Vandenburg concedes that the *Sports Illustrated* article was published "simultaneously" with the Newsweek article. Obviously, then, Axthelm could not have seen the *Sports Illustrated* article before his own article was published.

VII

Newsweek has freely conceded from the outset of this litigation that its article contained two minor, non-libelous, insignificant errors of fact:

1. Since only five of the six UTEP athletes who ran at the NYAC Meet boycotted the Brigham Young Meet, its reference to "the same athletes" being dropped, although substantially true, was technically inaccurate.

2. Although Harry Edwards had talked personally with many of the UTEP athletes while he was at El Paso, he did not talk with the black members of the track team, who happened to be away from El Paso at the time.

These minor errors are the springboard from which Vandenburg has deliberately distorted testimony in a patent effort to demonstrate a preexisting (although unexplained) intention on Axthelm's part to harm Vandenburg through falsehood. As to the second of such errors, for example, Edwards' *full* testimony is not as Vandenburg would have it. (Br. p. 11), but as follows (Record, pp. 457-459, 465):

> "I did not talk directly to the track athletes. I talked to other athletes at the school, and what this was, it was an open discussion, an honest discussion between Blacks. One reason why the meeting was

closed to Whites, we have found when Whites are in the room, Blacks have a tendency not to be as honest as it is probably necessary for them to be under situations such as we were dealing with there, and it became quite clear to me that, in fact, Vandenburg had intimidated the Black athletes involved. Now, as I stated before, the quotation is inaccurate only to the extent that one could interpret that quotation as meaning I talked directly to the track athletes. I talked to athletes at the University of Texas at El Paso. I talked briefly to them and perhaps some of them still at the University talked to the track athletes after I had gone or some of the athletes there talked to the Black track athletes after I had gone, but I did not talk to them directly. So my investigation, which as I stated was one of the main reasons I accepted a speaking engagement at the University of Texas at El Paso consisted of talking to athletes who were actually participating at that University, and the track athletes were not there, but the other athletes corroborated the fact that Vandenburg had intimidated the athletes and that it was, in fact, a policy of the Athletic Department that if a Black athlete boycotts—as with the New York Athletic Club thing, that any athlete who boycotts a meet, a regularly-scheduled event, would be no longer—considered no longer on the team, and this was also something that we had heard when we called the University of Texas at El Paso during the—just before the game between San Jose State and the University of Texas at El Paso was to be played, and we had talked to a couple of people who were on the campus at that time, and we were trying to figure out how we

could bring pressure on San Jose State to correct the injustices that Black people were suffering on that campus and in that community, and we had asked a couple of individuals on the campus there, via the telephone through some contacts that we had, would the Black athletes from the University of Texas at El Paso play if the Black athletes at San Jose State boycotted the football game, and we were told if they did not play, they would lose their scholarships, and this was as early as September 1967, before the New York Athletic Club thing ever came up, and this was one of the things that drove the Black students at San Jose State to formulate a policy to disrupt the game in order to bring about pressure to correct or at least get a commitment to correct the injustices that all Black people were suffering at San Jose and on that campus. So, as early as September, really, of 1967, we had gotten word that Black athletes would lose their scholarships if they boycotted any games or any regularly-scheduled athletic events.

* * *

"I made it clear to Pete Axthelm that at the meeting of April, 1968, the athletes were not present but that I had corroborated the reports that I and members of my staff had got in April of 1968 in particular, as well as during other periods of time, with one athlete from the University of Texas at El Paso who stated that the reports were correct, and who also stated that they had, in fact, as a result of the Brigham Young boycott, lost their athletic grants-in-aid; that they had been taken away from them. This is what I made clear to Pete

> Axthelm. I believed the assertions to be true; that the people—athletes in Modesto had corroborated it to me and that members of my staff had had many assertions corroborated with Black students at the University of Texas at El Paso and also other Black athletes from there."

Vandenburg would also have this Court believe (Br. pp. 8-9) that Axthelm admitted that his entire article was "vague" and should have been more carefully researched. But the carefully "edited" testimony Vandenburg quotes refers, not to the entire article or Newsweek's conduct, but only to Axthelm's candid admission of the error respecting "the same athletes" (Record, pp. 312-14).

Another example of Vandenburg's "loose" use of the testimony is his suggestion (Br. p. 9) that Anita Verschoth was a "vague and technically inaccurate" source because she admitted she knew nothing about the rumored threats at the NYAC Meet. Newsweek, however, never cited Miss Verschoth as a source for this particular aspect of its article, but only with respect to the statement regarding Vandenburg's actions at Brigham Young (Record, pp. 577-81) —a statement which Miss Verschoth supported without equivocation.

Despite Vandenburg's shaded and clipped recitation of Skinner's testimony (Br. pp. 9-10), it is inescapable that Skinner told Axthelm that the athletes had been required to compete at New York. (Record pp. 521-522). Additionally, in answer to Vandenburg's Cross-Interrogatory No. 12, Skinner related what he in fact told Axthelm concerning the aftermath of the Brigham Young boycott:

> "The best I can remember is that I said to Pete, relative to that situation was, you know, 'I talked to Bob Beamon the night before and the brothers had

indicated and said that the man had kicked him off the squad'.

"And Axthelm, I think, was saying to me something like: What are you talking about 'the man'?

"And I said, 'Coach Wayne Vandenburg'. And that was basically the way I communicated it to him.

"And, you know, we went into many things about that, many things about other things relating to information concerning black athletes. We kind of jumped, hit here and there, you know, on the conversation. Like all our conversations were like that, you know. I gave him, first of all, things that he required, and then other things I'd gathered." (Record p. 526).

Again, Vandenburg (purporting to quote the testimony of Skinner) seeks to persuade this Court that Skinner told Axthelm his information was based on rumors only. Thus, Vandenburg (Br. p. 9) quotes Skinner as follows:

> "We had even heard *rumors for the fact, but no proof of it . . . You know, you don't go with rumors;* you only go with facts. You prefer by word of mouth by others, really. (Skinner 514)" (Emphasis supplied by Vandenburg)

This testimony, however, pertained to rumors that Vandenburg had threatened two of his athletes from the Bahamas with loss of their passports if they did not compete at Brigham Young. Thus, the testimony, without misrepresentation, was actually as follows (514-15):

> ". . . We had even heard rumors for the fact, but no proof of it, but that two brothers of the Bahamas that ran in the BYU meet when they attended Texas—El Paso, they ran and we had

> no facts and nobody, to my knowledge, talked to the two brothers if this was true, but this was one of the rumors that was around. You know, you don't go with rumors; you only go with facts. You prefer by word of mouth by others, really."

Significantly, the Newsweek article contains no reference to these rumors and thus, if the Skinner testimony quoted in Vandenburg's brief has any significance at all in the context of this case, it means either (a) that Skinner was not prepared to pass onto Axthelm rumors, the veracity of which he could not establish, or (b) that Axthelm was not prepared to publish such rumors. How such evidence could possibly support a claim of "actual malice" is beyond our understanding.

In summary, although Vandenburg has attempted to deceive this Court into the belief that Axthelm's sources failed to provide him with information justifying the statements concerning Vandenburg, his assertions—and his deliberately distorted version of the testimony—do not bear scrutiny. This Court need only read the unedited testimony of the witnesses Edwards, Verschoth and Skinner, set forth in Appendix F to our Petition, to find that Axthelm's sources for the statements here involved were direct, several and consistent.

VIII

Vandenburg does not dispute that the doctrine of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), is applicable here. Instead, he relies exclusively on the claim that the Record facts establish "actual malice" within the framework of *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967), and *Goldwater* v. *Ginzburg,* 414 F. 2d 324

(2d Cir. 1969), *cert. denied*, 396 U. S. 1049, *reh. denied*, 397 U. S. 978. But the distinctions in both cases are obvious and in each instance controlling: Curtis relied on a single source who was known by it to have been involved in a recent criminal matter, and whose veracity was obviously dubious. With respect to the February, 1968, incident, *Newsweek's* article is based on consistent information provided by a number of separate, independent sources, each of whom was so situated as to encourage and warrant Axthelm's confidence, as well as Vandenburg's own belatedly conceded actions at Brigham Young.

Vandenburg has also criticized Axthelm for not contacting the UTEP athletes involved or members of the UTEP administration before writing his article. In answer, it need only be said that, at the time the article was written, Axthelm had ample material before him to support and justify what he wrote, and that *St. Amant* v. *Thompson*, 390 U. S. 727 (1968), *New York Times Company* v. *Connor*, 365 F. 2d 567 (5th Cir. 1966), and *Time, Inc.* v. *McLaney*, 406 F. 2d 565 (5th Cir. 1969), *cert. denied* 395 U. S. 922, among other authorities, have all held that one may rely on such reports where he does not act with "a high degree of awareness of their probable falsity."

Goldwater v. *Ginzburg, supra*, p. 15, is likewise completely inapposite. The opinion in *Goldwater* recites a parade of hard, direct facts which not only clearly inferred "actual malice", but which approached conclusive proof of the same. There can be no doubt that the defendant in the *Goldwater* case had embarked on a campaign to establish Goldwater's emotional and mental instability and his unfitness for the Presidency, regardless of the facts. There is no evidence of any such preconceived design and purpose here.

CONCLUSION

In our Petition for a Writ of Certiorari (p. 7 fn.), we challenged Vandenburg to cite any testimony in the Record which controverted the testimony set forth in Appendix F to the Petition or which otherwise established a triable issue with respect to "actual malice". As we have demonstrated, Vandenburg's only response to that challenge has been to distort the Record in an apparent and studied attempt to mislead this Court.

Despite his inexcusable shaping and shading of the Record, Vandenburg has failed to unearth even a scintilla of evidence of any design or intent, by Axthelm or by Newsweek, to malign his character by deliberate falsehood or with reckless disregard of the truth. To the contrary, the Record establishes beyond dispute that Axthelm believed in good faith—and had ample grounds for believing—that what he said about Vandenburg in the Newsweek article was entirely true. The Record reflects that, prior to publication, extensive investigation was conducted and that every material statement in the article was supported by information received from sources believed reliable and accurate—sources all consistent with one another. Summary judgment is therefore required in this case to avoid the harassment of protracted and expensive litigation, itself violative of the privileges secured by the First and Fourteenth Amendments.

We believe that, if the Fifth Circuit had not avoided its constitutionally prescribed duty to review the Record, this case would no longer be pending; but irrespective of the outcome of Newsweek's motion on the merits, the Fifth Circuit, by declining to review the Record, has, we submit, deprived Newsweek of its constitutional rights. As this

Court recently held in *Rosenbloom* v. *Metromedia, Inc.*, 39 U. S. L. W. 4694, 4702 (June 7, 1971):

> "Aside from these particularized considerations, we have repeatedly recognized that courts may not avoid an excursion into factfinding in this area simply because it is time consuming or difficult. We stated in *Pennekamp* v. *Florida*, 328 U. S. 331, 335 (1946), that:
>
> > 'The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' (Footnote omitted).
>
> Clearly, then, this Court has an "obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments," and in doing so "this Court cannot avoid making an independent constitutional judgment on the facts of the case." *Jacobellis* v. *Ohio*, 378 U. S. 184, 190 (1964). The simple fact is that First Amendment questions of "constitutional fact" compel this Court's *de novo* review. See *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963); *Blackburn* v. *Alabama*, 361 U. S. 199, 205 n. 5 (1960)."

Certainly the obligation of this Court to undertake a *de novo* review of the record where First Amendment freedoms are at stake is equally an obligation imposed on the Fifth Circuit; and the length of a record relating in large part to issues other than "actual malice" cannot justify that Court's failure to discharge its constitutional obligation.

For all of the reasons assigned in our Petition for Certiorari and in this Reply Brief, we respectfully submit that our Petition should be granted.

Respectfully submitted,

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STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

STEPHEN FROLING, being duly sworn, deposes and says that he served the foregoing Reply Brief upon the attorneys for respondent herein, on July 30, 1971 by mailing three true and correct copies thereof, airmail postage prepaid to Francis C. Broaddus, Jr., Esq., Attorney for Respondent, 525 Southwest Center, El Paso, Texas 79901, and to Burt Williams, Esq., Attorney for Respondent, 707 Southwest Center, El Paso, Texas 79901.

/s/ STEPHEN FROLING
Stephen Froling

Sworn to before me this
30th day of July, 1971.

.....
Notary Public